Jepkemoi (Suing as the legal representative & administrator of the Estate of the Late Mercy Jelagat) v Tisam Motors Ltd & 2 others (Civil Appeal E012 of 2022) [2023] KEHC 21276 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21276 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E012 OF 2022

RB NGETICH, J

JULY 27, 2023

BETWEEN

JUDITH JEPKEMOI (SUING AS THE LEGAL REPRESENTATIVE & ADMINISTRATOR OF THE ESTATE OF THE LATE MERCY JELAGAT) ..... APPELLANT

AND

TISAM MOTORS LTD ..... 1ST RESPONDENT

REV WILLIAM K KOTUT ..... 2ND RESPONDENT

LABAN KIPLIMO KIMARO ..... 3RD RESPONDENT

(Being an appeal from the Ruling and consequential Orders of the Senior Principal Magistrate's court at Eldama Ravine delivered by the Hon. A. Towett (SRM) dated 29.11.2022))

JUDGMENT

Background

1. This appeal arose from the ruling delivered by Hon. A. Towett Senior Resident Magistrate on 29th September, 2022 in Eldama Ravine Magistrate's Court Civil Suit Nos. 119, 124 and 125 of 2009 on application by the Respondents herein in the trial court dated 5th August, 2022 filed on 8th August, 2022 in which the Respondents sought the following orders:-

    a. That the judgment entered on 26th January, 2011 together with the Decree issued on 25th July, 2022 be set aside and the matter be heard afresh.

    b. That the Honourable court be pleased to grant leave to the 2nd and 3rd Respondents to file their defence out of time and the Draft defence herein be deemed as properly filed save for payment of court fees.

c. That costs hereof be in the cause.

2. The respondent's application was opposed by the Appellant through replying affidavit sworn on the 29th August, 2022 and a further affidavit dated 5th October 2022 submissions dated 5th October, 2022.

3. Upon the hearing of the application, the court delivered a ruling on the 29th November, 2022 granting the following orders:-

   a. That the ex-parte judgment dated 26th January,2011 together with the Decree issued on 25th July, 2022 is set aside.

   b. That each party to bear its own costs

   c. That the matter be mentioned on 14th February, 2023 to confirm compliance with order 11 of the civil procedure Rules.

4. The Appellant being aggrieved the above orders preferred this appeal raising the following grounds:-

   i. That the Learned Magistrate erred in law and in fact in setting aside the ex-parte judgment in view of her findings that service of summons had not been properly effected and yet it was not in dispute the firm of M/S Kipkenei & Co. Advocates had entered appearance on behalf of the 2nd and 3rd Respondents.

   ii. That the Learned Magistrate erred in law and in fact in setting aside the ex-parte judgment in the absence of any reasonable explanation or excuse for the inordinate delay of eleven years by the Respondents in filing a defence despite the Respondents having been properly served with summons and entered appearance through the firm of M/S Kipkenei & Co. Advocates.

   iii. That the Learned Magistrate erred and misdirected herself in law and fact by not applying the correct law, tests and principles relating to setting aside of default judgements in the exercise of judicial discretion.

   iv. That the Learned Magistrate contravened the rules of evidence by admitting and placing reliance on a purported letter from the firm of M/S Kipkenei & Co. Advocates adduced and annexed by the 3rd Respondent in his further affidavit sworn on 5th October,2022.

   v. That the Learned Magistrate erred in law and fact in failing to exercise her judicial discretion to award the Appellant considerable thrown away costs given that the ex-parte judgement was set aside eleven years after it was entered.

5. The Appellant seeks the following orders: -

   i. That this appeal be allowed.

   ii. That this Honourable court sets aside the Ruling by the Honourable A. Towett Senior Resident Magistrate dated 29th November, 2022.

   iii. That in the alternative to (ii) above, the findings of the lower court be set aside and be replaced by the appropriate orders in the circumstances of this appeal.

   iv. That costs of the Appeal be borne by the Respondents.

   v. Any other reliefs as the Honourable court may deem fit and just to grant in the circumstances of this appeal.

6. The appeal was canvassed by way of written submissions.

Appellant's Submissions

7. The Appellant filed written submissions dated 19th April,2023 and argues that it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one which is irregularly entered. That in a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, they fail to enter appearance or to file a defence, resulting in default judgment. That in the present suit, a regular judgment was entered against the Respondents having entered appearance but failed to file defence.

8. Counsel for the Appellant submit that while the court has unfettered discretion in determining whether or not to set aside the default judgement, the court in Mbogo & Another v Shah set out some considerations which ought to be taken into account while exercising such discretion. That the court ought to take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgement was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is the interest of justice to set aside the default judgement.

9. Counsel submits that in the present case, the Learned magistrate erred and misdirected herself in law and fact by not applying the correct law, tests and principles relating to setting aside of default judgements in the exercise of judicial discretion; that the purpose of summons to enter appearance is to inform a defendant of the institution of suit as was held in the case of Equitorial Commercial Bank Ltd vs Mohan Sons (k) Ltd (2012) eKLR.

10. The appellant further submits that the Respondents were served with summons and pleadings and on 15.4.2010, the firm of Kipkenei & Co. Advocates filed a memorandum of appearance to that effect; that the Respondents deny having instructed the said firm and this Honourable court has an opportunity to examine the said denial.

11. Counsel further submits that the Respondents filed a replying affidavit dated 5.2.2020 in which the deponent alleged they had reached out to the firm of Kipkenei & Co. Advocates and in the conversation, the said firm of advocates denied having been instructed; that the Honourable magistrate posited that the Appellant had failed to comment on the further replying affidavit a position they strongly disagree.

12. That the Appellants in their submissions dated 10.10.2022, at paragraph 15 made an explanation to the extent that the further affidavit was never served upon her and the Appellant became aware of the affidavit in the submissions stage and the position taken by the Magistrate that the Appellant was aware of the said affidavit is totally misleading.

13. Counsel submits that they have had the opportunity to look at the further affidavit and wish to reaffirm their position that summons were duly served. That in the annexure labelled LKK 1B, the import of it solidifies their arguments that summons had been served and in fact counsel on record made efforts to reach out to one of the Defendants who informed them that parties had reached an agreement.

14. Counsel further submits that in addition, there is an affidavit of service on record dated 21st October, 2010 sworn by a process server known as James Gitau and in the said affidavit, the Respondents herein were duly notified of the hearing but made no attempts to defend the suit.

15. That if indeed there is doubt as to the authenticity of the contents of the affidavit of service, there was need to cross-examine the process server on the contents. The Appellant in support of his argument relies in the case of Agigreen Consulting Corp Ltd v National Irrigation Board (2020) eKLR.

16. Counsel submits that it is trite law that he who alleges must prove; that the Respondents herein had a burden of proving that service was irregular.

17. On length of delay counsel submits that what is or is not inordinate delay depends on the facts of each particular case and the trial court should not have had a difficulty in recognizing inordinate delay when it occurs; that in the instant case, judgment was delivered on 26.01.2011; the trial magistrate failed to take into account that the Respondents here wanted to set aside the judgment 12 years later. That the delay is inordinate and no plausible reason was advanced to explain the delay.

18. Counsel for the appellant further submit that the trial court failed to address its mind as to whether or not the draft defence raised triable issues as a consideration before setting aside the default judgement; that the draft defence attached was a mere denial which does not amount to a defence and fails to raise any triable issues hence the court should have inclined towards not setting aside default judgement.

19. Counsel further submits that the trial court should have exercised its judicial discretion to award the Appellant considerable thrown away costs given that ex-parte judgement was set aside eleven years after it was entered.

20. That the jurisprudential explanation for thrown away costs are to cater for substantial indemnity costs to reflect time that was wasted and would be duplicated when the trial was scheduled and referred to the case of County Government of Tana River & Another v Hussein Fumo Hiribae [2021] eKLR.

21. In conclusion counsel submits that it is trite that the general rule for the exercise of the court's discretion is to look at the cost and the indemnity principle and submits that the trial court while exercising its discretion, should have at the very least awarded the Appellant costs.

Respondent's Written Submissions

22. The Respondents submit that the appellant never contested issues raised by the respondents in their application in the trial court and it is only fair and just that the same be disregarded herein as the same would be prejudicial to the respondent who did not have a chance to respond to the same in the trial court.

23. That nowhere in her Replying affidavit did the appellant dispute the respondent's fact that service was not affected and the reliance they placed in the trial court was that Respondents entered appearance.

24. On the argument that the respondent should have cross examined process server, the respondent submit that the appellant did not raise this in her Replying affidavit in the trial court.

25. Respondent submits that the argument that the application for setting aside delayed is a new issue and argument that was never an issue for determination in the trial court.

26. Further that the appellant did not raise the issue that the respondents' defence does not raise triable issues despite filling her replying affidavit and submissions as pages 10-11and 27-32 respectively of the record of appeal.

27. The respondent refereed to the case of TWaher Abdulkarim Mohamed V Independent Electoral &boundaries Commission (iebc) & 2 Others (2014) EKRL where the court relied on the holding by Platt JA in wachira v. Ndanjeru (1987) KLR 252, which was decided as follows:

> " The principles can be summarized as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercise unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which

were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case. (See Tanganyika Farmers Association Ltd. v Unyamwenzi development corporation (1960) EA 620, Overseas Finance Corporation Ltd v. Administrator General (1942) 9 EACA 1). But the court will allow a new question concerning the construction of a document or the legal effect of admitted facts, since no questions of evidence arises, and it will usually be regarded as expedient in the interests of justice to do so."

28. The respondent further referred to the case of Margaret Wanjiru Ndungu V Sammy Wagura Karanja (2015) EKLR where the honourable court held:

> " This court takes cognizance of the first principles that pleading are designed to facilitate the setting out of parties 'claim with sufficient particularity to enable the adverse party to respond. Accordingly, a party may not be permitted to raise a ground which is not pleaded because the respondent will not have an opportunity to rebut it. It is clearly a matter of justice of the case to see that a party against whom the new point is sought to be taken is not prejudiced by being taken by surprise at the new point on appeal without an opportunity to respond to the issue and have the facts investigated by the trial court. See Wachira v Ndanjeru (1987) KLR 252 per Platt JA.
>
> In my view, it is not in interest of justice to consider a new cause of action that was never pleaded as that would not give the respondent a fair trial."

29. Counsel for the respondents submit that all the above issues were not issues for determination in the trial court according to the appellant and she is now sneaking them in for determination on appeal as if she had disputed them. This amounts to an ambush on the respondent and an afterthought on the part of the Appellant.

30. It is Respondents' case that the appeal is not merited in that the Respondents concur with the appellant on the general principle that the appellate court will not ordinarily interfere with the trial court's discretion unless the principles applied in the said case of Philip Kiptoo Chemwolo & Another v Augustine Kubende as quoted by the appellant in her submissions are laid out.

31. On whether the default judgment was regular or irregular, counsel for the respondents submit that the default judgment herein was irregular and it was the right decision for the Honourable to set it aside.

32. As to whether summons to enter appearance were duly served upon the Respondents, the Respondents submits that in fact, the appellant never in her replying affidavit in the trial court dispute the Respondent's fact that service was not affected. The only reliance they placed in the trial court was the Respondent entered appearance; and submit that this is a new issue that has been raised in this appeal and specifically in the appellant's submissions. It is clearly an afterthought.

33. Counsel for the respondents submits that it was never the intention of the respondents to fail to enter appearance. They were never served with the summons. Had they been duly and/or properly served; they would have defended the suit. Unfortunately, they came to learn of the existence of the suit 11years after judgment was delivered. This is after the Appellant took her luxurious time to wait and eventually decide to hurriedly execute a judgment yet she knew of existence over 11 years ago.

34. Counsel further submit that it appears that the Appellant was fully aware of the fact that the Applicants were never served with the summons and was for all those years contemplating whether or not to execute the judgment because the same was irregular as no other explanation is given for the delay.

35. On whether the process server should have been cross examined, the respondents submit that Appellant did not raise this in her Replying affidavit in the trial court; that the issue of the affidavit of service was never raised by the Appellant in her Replying affidavit and in fact, she did not dispute the Respondent's' fact that service was never affected but only dwelt on entry of appearance by the firm Kipkenei & Co. Advocates; that issue that process server was not cross examined is new issue in this appeal, is afterthought and should be disregarded by this Honorable appeal court.

36. The Respondents referred to the case of Wachira Karani v Bildad Wachira (2016) eKLR where the honourable court observed that:

> "It is important to mention that the integrity of the service having been questioned, it was necessary for the process server to be available and shed light on the issue. Counsel for the applicant raised the issue but never applied to cross- examined the process server. Similarly, counsel for the Respondent did not deem it fit to avail him if at all the service was indeed beyond reproach. The court was denied a golden opportunity to interrogate the issue further when the parties opted to dispose the application by way of written submissions."

37. Counsel further submits that even if the Respondents did not seek an order to cross examine the process server, the Appellant on her end should have deemed it fit to avail the process server if at all the service of the summons to enter appearance was indeed beyond reproach, instead, the Appellant entirely avoided touching on the issue of service in the trial court and raises suspicion as to whether or not the Respondents were indeed served.

38. On Kipkenei & Co. Advocates entering appearance on behalf of the respondents, counsel submit that they have never instructed the firm of Kipkenei & Co. Advocates to enter appearance for them in the matter and this is evidenced from the annexure marked as LKK1b in the Respondent's further Affidavit on page 12-19 of the Records of appeal.

39. Counsel further submits that the only proof that the summons were served is through the affidavit of service and how does the appellant convince this court that service was affected in the first place; that neither the affidavit of service for the summons or the hearing notice purportedly dated 21th October, 2010 are on record herein; and no service of any documents were ever effected upon the Respondents until the year 2022.

40. Counsel submit that the Respondents were not served in the first place and could not therefore instruct Counsel and if a friend is said to have instructed counsel on their behalf as alleged then no proper instructions were given by the Respondents; and the Respondent never paid any legal fees to the said firm for the instructions to be valid and the said firm did not therefore have any legal capacity to act for the Respondents at all; if the matter had been amicably settled as stated by the advocate, then the record can bear witness that at no point in time did the parties did the suit record a consent and that is way there is a judgment.

41. Counsel submit that the judgment was qualified as a regular default judgment only because of the mistake or error of the said law firm purporting to have instructions in the matter. This mistake should therefore not be visited upon the Respondent herein. Counsel for the respondent referred to the case of David Kiptanui Yego & 134 others v Benjamin Rono & 3 others (2021) ekLR where honorable court held the general principle is that an applicant should not suffer due to a mistake of its counsel and further in the case of Winnie Kibinge & 2 others v Match Electricals Limited, the court held that it does not follow that just because a mistake has been made a party should Suffer the penalty of not having his case heard on merit.

42. And further submit that the honorable court' discretion should be exercised to avoid an injustice or hardship resulting from accidents, inadvertence, or excusable mistake or error; that the appellants claim that she came across the Respondent's further affidavit during submissions stage does not hold water; that they attended court to confirm filing of the submissions but the Appellant never sought leave to file a supplementary affidavit on the issue raised therein but chose to proceed with the matter as it was. The Respondent's evidence therefore remains uncontroverted.

43. On the issue of inordinate delay, the respondents submit that Appellant waited for 11years to execute the judgment. In fact, it was only in year 2022 that the Appellant woke up from her slumber to extract a decree for purposes of executing a judgment delivered in the year 2010. On the other hand, the Respondents just came to know of the existence of the matter in October, 2022 and immediately acted on the same by filing an application for stay of execution and the setting aside of the judgment.

44. On submission that equity does not aid the indolent, counsel submit that the appellant sat on her judgment for 11years. She never served the Respondent with the judgment. She never extracted a decree; and urged this court to find that it is the Appellant and not the Respondents who is guilty of inordinate delay.

45. Counsel further submit that the Respondents are very much interested in the expeditious disposal of the trial court suit and is seeking that fairness and justice be duly granted for the benefit of all the parties.

46. As to whether the Defence raises triable issues, the respondent submit that at no time did the appellant raise the issue and submit that an appeal court only handles issues that were issues before the trial court and not new issues; that there is no admission of liability in the Defence and the same should go to trial for fair hearing of the defence case on merits.

47. That the 1st Respondent herein denies being the actual owner of the subject motor vehicle as evident in paragraph 3 of the Draft Defence and denies plaintiff's injuries as per the plaintiff's allegations in the paragraph 8 of the plaint. Further, the Appellant was also not cross examined on the issues of injuries suffered and the respondent herein have a defence that the real facts of the case are misrepresented; that this is a road traffic case and it's up to the Appellant to prove her case.

48. Counsel submit that even if there is only one issue that is in dispute and is triable, the Honorable court should consider it and allow the Respondent a chance to defence the suit for justice to prevail. That the court ought not consider if the defence is one that must succeed in the trial and submit that the issues are triable.

49. And relied on the case of David Koome Matugi V Apa Insurance Limited (2021) EKLR where it was held that,

> " Triable issue is a bona fide issue worth of trial by a court of law; but it is not one which must succeed in the trail. It is surprising; therefore, the learned trial magistrate made a finding that the said defence raised no triable issue.
>
> (36) Meritorious defence – one with triable issue- justifies inter parties adjudication of the issues by the court in defence to the right to a fair and a public hearing of the dispute declared in the article 50 of *the constitution* that; "(1) Every person has the right to have any dispute that can be resolved by the application of law dedicated in a fair and public hearing before a court..."
>
> (37) Refusing the Appellant to canvass his defence and have the issues determined on merit by court is skin to the proverbial 'sword of the Damocles'

(38) the upshot of this is that there was no reasonable ground for dismissing the draft defence suo moto; the draft defence prima facie raises triable issues..."

50. They further referred to the case of Roy Parcel Services Limited v Boniface Shibutse Shibunyanga (2020) eKLR where the appeal court held that the dismissal of the defence is an act that ought to be an act of last resort. Counsel further referred to Article 50 of *the constitution*, on fair hearing; right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court and Article 159 of *the constitution* and submit that there was no reasonable ground for dismissing the defence suo motu, and the defence prima facie raises triable issues."

Analysis And Determination

51. The Appellant's argument is that the respondents were served with summons to enter appearance and file defence and on 15.4.2010, the firm of Kipkenei & Co. Advocates filed a memorandum of appearance on behalf of the respondents. On the other hand, the respondents deny giving instructions to the firm of Kipkenei and Co. Advocates.

52. The Appellant argues that the Respondents filed a replying affidavit dated 5.2.2020 in which the deponent alleged they had reached out to the firm of Kipkenei & Co. Advocates.

53. The Appellants in their submissions dated 10.10.22, at paragraph 15 explained that further affidavit was never served upon her and learnt of the affidavit at submissions stage and the position taken by the Magistrate that the Appellant was aware of the said affidavit is totally misleading.

54. On whether defence raises triable issues, the respondents argue that they denied contents of the plaint and should be granted an opportunity to fully canvass the issue therein and the plaintiff to prove the allegations in full trial; that actual owner of the subject motor vehicle is denied and plaintiffs injuries as per paragraph 8 of the plaint are denied and it would be fair to prove in full trial as the claim arise from road traffic accident and the plaintiff should prove her claim against the respondents. The appellant faults the trial court for setting aside judgment after 11 years without awarding thrown away costs.

55. I wish to consider is whether the trial court properly exercised its discretion in allowing the application to set aside judgment entered in default of defence. The Provisions of Order 7 of the Civil Procedure Rules, rule 1 requires the Defendant by itself or through counsel to enter appearance within 14 days after service and thereafter enter defence within 14 days after entering appearance.

56. The Appellant's claim arose from road traffic accident. The firm of Kipkenei & co. advocates entered appearance on behalf of defendants' but failed to file a defence within stipulated time.

57. Record show that the Appellant applied for judgment in default of defence pursuant to Order 10 of the Civil Procedure Rules and the trial court entered interlocutory judgment. The Respondents in their application dated 5th August,2022 inter alias sought to set aside the interlocutory judgment entered. The application to set aside the exparte judgment was brought under Order IXA rule 10 of the Civil Procedure Rules which provides as follows: -

" 10. Where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

58. The provisions of Order 10 Rule 11 Civil Procedure Rules provides that the court has discretion to set aside or vary such judgement and any consequential decree or order upon such terms as are just. For court to exercise discretion, the applicant is required to demonstrates that

a. That they were never served with the pleadings and were therefore not aware of the proceedings.

b. That the Appellant had a good defence that raised triable issues.

59. In the case of Shah Versus Mbogo & Another [1967] E.A, the court stated that exercise of discretion to set aside exparte judgment is intended so to be exercised to avoid injustice or hardship resulting from accident, in advertence, or excusable mistakes or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

60. On whether there was regular judgment entered by the court, I take note of the fact that entry of appearance was done. The intention of service of summons in my view is to make the person sued aware of the claim before court. Even though the respondents deny giving instructions to the Advocate, the fact that there is entry of judgment, what will register in the mind of the court is that the person sued is aware of the suit and ought to file defence; which should be filed within the stipulated time and if not, leave for extension of time ought to be sought. In view, the fact that entry of appearance was filed. I am of the view that interlocutory judgment was regularly entered. The issue as to whether the respondents had instructed the firm of Kipkenei and Company Advocates is an issue to be resolved between Respondents and the law firm

61. It is not however enough for court to find that judgment was regularly entered. The court should go ahead to consider whether the draft defence discloses triable issue. The respondents in draft defence raised triable issues and it would be in the interest of justice to allow the respondents to participate in the proceedings.

62. Further to the above, the *Civil Procedure Act* (Cap 21) under section 1A and 1B. Under section 1A (1) provide for overriding objective which enjoin courts to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Courts are required to balance scale of justice and ensure fairness on both sides. In view of the fact that the defence demonstrate triable issues, justice will be served by allowing the respondents participate in the proceeding and in view of the fact that I have found entry of judgment was regular, the appellants deserve thrown away costs upon setting aside- of interlocutory judgment.

63. Having found that entry of judgment was regular, the appellant deserves thrown away costs. From the foregoing I find that appeal partly succeed.

Final Orders: -

64. Appeal partly succeeds

65. Decision to set aside exparte judgment is upheld

66. The Appellant is awarded thrown away costs of kshs 50,000 to be paid within 30 days from the date of this ruling.

67. Each party to bear own costs of appeal

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 27TH DAY OF JULY 2023.

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RACHEL NGETICH

JUDGE